

ATTORNEY GENERAL
GREGORY H. SMITH

THE STATE OF NEW HAMPSHIRE



ATTORNEYS
DANIEL J. MULLEN
JAMES D. CAHILL, III
JEFFREY R. HOWARD
G. DANA BISBEE
GREGORY W. SWOPE
PETER T. FOLEY
STEVEN M. HOURAN
EVE H. OYER
EDNA M. CONWAY
AMY L. IGNATIUS
T. DAVID FLOURDE

THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397
August 31, 1983

83-110-I

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
ANNE R. CLARKE
MARC R. SCHEER
DONALD J. PERRAULT
MARTIN R. JENKINS
PETER W. MOSSEAU
BETSY S. WESTGATE
EDWARD L. CROSS, JR.
PETER C. SCOTT
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER
PAUL BARBADORO
BRUCE E. MOHL
JOHN A. MALMBERG
DOUGLAS L. PATCH
LORETTA S. PLATT
ROBERT P. CHENEY, JR.
LESLIE J. LUDTKE
ANDREW L. ISAAC
RONALD F. RODGERS

Mr. Michael R. Cornelius, Comptroller
Department of Administration and Control
State House Annex
Concord, New Hampshire 03301

Dear Mr. Cornelius:

You have asked this office whether Sec. 116 of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982 applies to the State of New Hampshire. Section 116(a) amends 29 U.S.C.A. §623(g)(1) of the Age Discrimination in Employment Act of 1967 by adding a new section which states:

"For purposes of this section, any employer must provide that any employee aged 65 to 69 shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee under age 65."

Before the enactment of Sec. 116, Medicare provided health insurance primary coverage to state employees between the age of 65 and 69. The State's Blue Cross and Blue Shield plan provided only secondary coverage. Now, Sec. 116 requires all employers to offer the same health insurance coverage to all eligible employees up to age 70. If the State of New Hampshire is an "employer" under this section, then the State must offer its health plan, as primary insurer, to all eligible employees between the ages of 65 and 69. Under Sec. 116 an employee may, however, reject the health plan offered by the State and retain Medicare as the primary coverage.

In order to determine the applicability of 29 U.S.C. §623(g)(1) to the State of New Hampshire, it is necessary to

Legal Counsel (603) 271-3658
Charitable Trusts (603) 271-3591
Unemployment Compensation (603) 271-3712



Consumer Protection (603) 271-3641
Criminal Justice (603) 271-3671
Eminent Domain (603) 271-3675
Environmental Protection (603) 271-3678

determine whether the State is included within the definition of the term "employer" in the Age Discrimination in Employment Act of 1967. The term "employer" is defined in 12 U.S.C. §630(b) as including, "a State or political subdivision of a state, and any agency or instrumentality of a state...". Clearly, the statutory definition of employer includes the State of New Hampshire.

The only remaining question is whether 29 U.S.C. §623(g)(1) is consistent with the Tenth Amendment of the Constitution of the United States, which has been held to prohibit a Congressional exercise of power which impairs the state's ability to function. National League of Cities v. Usery, 426 U.S. 833 (1976). Because Section 116 of TEFRA is directed to the Federal Government's liability for Medicare coverage, and does not require the state to provide a specified level of coverage to its employees, it is highly unlikely that the Tenth Amendment would bar the exercise of this Congressional power.

For these reasons, the state group health plan must be offered on the same conditions to all eligible state employees.

Very truly yours,



Leslie J. Ludtke
Assistant Attorney General
Division of Legal Counsel

LJL:alh
83-110-I